CRIMINAL PROCEDURE AND SENTENCING

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LEGISLATION

CORRECTIONAL MATTERS AMENDMENT ACT 5 OF 2011

All the sections of the new Correctional Matters Amendment Act 5 of 2011 came into operation on 1 March 2012, save for section 9 which only comes into operation with regard to sections 36, 37, 49, 49A, 49B, 49C, 49D, and 49F of the Correctional Services Act 111 of 1998 (the principal Act). The Correctional Matters Amendment Act 5 of 2011, repeals certain provisions of the Correctional Services Amendment Act, 2008, and provides for a new medical parole system. It also clarifies provisions with regard to parole, and provides for the management and detention of remand detainees.

With regard to medical parole, section 79 of the principal Act is replaced by an amended section 79 which provides that any sentenced offender may be considered for placement on medical parole by the National Commissioner, the Correctional Supervision and Parole Board, or the Minister, if such an offender is suffering from a terminal disease or condition, or is rendered physically incapacitated as a result of an injury, disease, or illness to an extent that severely limits daily activity or inmate self-care. Furthermore, the risk of re-offending must be low, and appropriate arrangements should be made for the inmate's supervision, care, and treatment within the community into which he or she is released. In terms of subsection 2, an application for medical parolemust be lodged in the prescribed manner by a medical practitioner, a sentenced offender, or person acting on his/her behalf. Subsection 3 provides that all such applications must be accompanied by a written medical report, and the Minister must establish a Medical Advisory Board to provide an independent medical report. The placement of a sentenced offender on medical parole is further subject to the informed consent of the offender to allow the disclosure of his/her medical information to the extent necessary, and an agreement by the offender to

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subject himself or herself to monitoring conditions set by the Correctional Supervision and Parole Board in terms of section 52. An offender placed under medical parole may also be required to undergo periodic medical examinations by a medical practitioner in the employ of the department.

When the Medical Parole Board makes a determination, the following factors must be taken into consideration: any sentencing remarks by the trial judge or magistrate; the type of offence and the length of the sentence remaining; the previous criminal record of the offender; or any of the factors listed in section 42(2)*(d)* (see s 79(5)).

Correctional Services Regulations

The Minister of Correctional Services published extensive amendments to the Correctional Services Regulations first published in the *Government Gazette* of 30 July 2004 (see *GG* 35277, RG 9739 GN 323 of 25 April 2012). In terms of these regulations, various aspects relating to the custody of inmates under conditions of human dignity, the classification of sentenced offenders, and the management, safe custody, and wellbeing of the various categories of prisoner are set out in detail. Particularly important is Chapter VI which provides for the release of inmates on day parole or parole, or their placement under correctional supervision. Section 29A of this chapter regulates release on medical parole, and section 29B the appointment and composition of the Medical Parole Advisory Board.

Criminal Procedure Amendment Act 9 of 2012

The Criminal Procedure Amendment Act 9 of 2012 was assented to on 25 September 2012 (*GG* 35714 No 782). This Amendment Act substitutes and aligns the provisions relating to the use of force in effecting an arrest with the Constitutional Court judgment in *Ex parte Minister of Safety and Security and others: in re S v Walters* 2002 (4) SA 613 (CC). The new section 49 reads:

> Use of force in effecting arrest
>
> 49. (1) For the purposes of this section —
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> (a) 'arrestor' means any person authorised under this Act to arrest or to assist in arresting a suspect; [and]
>
> (b) 'suspect' means any person in respect of whom an arrestor has [or had] a reasonable suspicion that such a person is committing or has committed an offence; and

(c) 'deadly force' means force that is likely to cause serious bodily harm or death and includes, but is not limited to, shooting at a suspect with a firearm.

(2) If any arrestor attempts to arrest a suspect and the suspect resists the attempt, or flees, or resists the attempt and flees, when it is clear that an attempt to arrest him or her is being made, and the suspect cannot be arrested without the use of force, the arrestor may, in order to effect the arrest, use such force as may be reasonably necessary and proportional in the circumstances to overcome the resistance or to prevent the suspect from fleeing: Provided that the arrestor may use deadly force only if —

(a) the suspect poses a threat of serious violence to the arrestor or any other person; or

(b) the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm and there are no other reasonable means of effecting the arrest, whether at that time or later.

Section 49(1)*(c)* now defines deadly force, and two requirements are included relating to the reasonable belief of the arrestor, and the use of deadly force in effecting the arrest (s 49(2)*(a)* and *(b)*).

It remains to be seen whether the new section 49 will provide greater clarity on exactly when lethal force may be used in effecting an arrest, and whether the enactment of this provision will curtail the alleged abuses by police officers in this regard.

CASE LAW

BAIL

A presiding officer cannot preside over both the bail application and the criminal trial

In *S v Bruinders* 2012 (1) SACR 25 (WCC), the appellant was convicted on two robbery charges and a charge of assault with the intent to do grievous bodily harm. He was sentenced to three years' imprisonment on the robbery charges, and two years' imprisonment on the assault charge; an effective sentence of five years' imprisonment. On appeal, the appellant submitted that he had appeared before the magistrate on a number of occasions, including for his bail application, and that the magistrate had therefore been aware of his previous convictions when he presided over the trial.

The court of appeal held that it is inimical to an accused's constitutional right to a fair and impartial trial that he or she not be

tried by the same presiding officer who presided over his or her bail hearing (para [77]). With reference to section 165(2) of the Constitution, it was held that it is not only actual bias that vitiates the proceedings or disqualifiesy a judicial officer from presiding over a court of law, but also an appearance of bias (para [6]). The test for apparent bias is well established (see paras [7]–[30] for an overview of the history and development of this test) and requires either a real 'danger' of bias, or a likelihood that bias will occur (para [13]). This apparent bias must also be apparent to any reasonable, objective and informed observer (para [23]).

With regard to the sentencing magistrate's earlier involvement in the appellant's trial, it was held that not all involvement between a judicial officer and an accused will automatically require that the judicial officer be disqualified from hearing the case. The test for apparent bias should be applied, and a determination is required of whether '. . . a reasonable, objective and informed person would reasonably apprehend that such a presiding officer would not bring an impartial mind to bear on an adjudication of the matter' (para [42]). The nature of the involvement, and the lapse of time between that involvement and the subsequent adjudication, are also factors to be considered (para [49]).

In this matter, the presiding officer had been involved in the appellant's bail hearing, and the decisions a court must make in bail proceedings will generally attract challenges based on an alleged perception of bias. This is because in a bail hearing, the presiding officer must consider a number of factors, including whether the accused has a criminal record, whether he is a flight risk, and whether there is a likelihood that he will be a danger to others if released on bail (para [64]). These are all subjective value considerations that are made against, or in favour of the bail application. It was held that

> it will thus be apparent . . . that the inquiry which a court is required to undertake in bail proceedings is not only an extensive one which requires more than an armchair approach, but also an exercise which may, more often than not (particularly where bail is opposed), result in the court becoming privy to information about the accused, or the offences with which he/she has been charged, which it would not ordinarily be possessed of, before the conclusion of the trial of the accused, and often not even then (para [74]).

With regard to the accused's contention that the presiding officer had prior knowledge of his previous convictions, it was held that courts are (generally) sensitive to having evidence (prior

to sentencing) that may reflect upon the fact that an accused has previous convictions. In such cases, presiding officers have either recused themselves (*S v Stevens* 1961 (3) SA 518 (C)), or have requested that a higher court set aside a conviction and sentence because the accused had appeared before the court in leg-irons or prison garb which showed that they were serving a sentence of imprisonment, and therefore had a prior conviction (*S v Phiri* 2005 (2) SACR 476 (T)) (para [69]). This is primarily because '[u]nconscious prejudices and bias can be insidious in their operation on people's minds' (para [76]). (With regard to the manner and clothing in which prisoners are presented at their criminal trials in court, see *Mvoko & another v Minister of Correctional Services & others* 2012 (1) SACR 472 (ECM) where the reasonable limitations warranted in ss 26 and 29 of the Correctional Services Act 111 of 1998 were considered.)

It is therefore important that a presiding officer recuse him- or herself from a trial if he or she also presided over the accused's bail hearing. Even if no real bias exists, justice must also be seen to be done, and reasonable members of the public cannot have confidence in and respect for a legal system that allows for convictions to stand in the face of such an irregularity (paras [81] and [92]). It was also said that given '. . . the fragile juncture we have arrived at in our legal system, public confidence in and respect for the administration of justice require standards today that may be higher than may have been the case two decades ago' (para [126]).

Sher AJ and Zondi J for the Western Cape High Court, also emphasised that the state, and specifically the National Prosecuting Authority, should take greater care in devising a system that ensures that presiding officers who had presided over a bail hearing, not be called upon to preside over the subsequent trial (para [124]).

Nonetheless, in *S v Majikazana* 2012 (2) SACR 107 (SCA), it was held that where the accused did not apply for the recusal of a trial judge at the beginning of the trial based on the fact that the trial judge had also presided over his bail proceedings, and the presiding officer did not consider recusing him- or herself for that same reason, actual bias needs to be proved if an appeal is to succeed (paras [12]–[13]).

Also see *S v Agliotti* 2012 (1) SACR 559 (GSJ) where it was held that an accused must be warned regarding the admissibility of *viva voce* testimony or evidence through an affidavit at a bail

hearing in subsequent proceedings in terms of section 60(11B)*(c)* of the Criminal Procedure Act 51 of 1977 (CPA).

Refusal of an extension-of-bail application pending an appeal in terms of section 321 of the Criminal Procedure Act 51 of 1977

In *S v Masoanganye & another* 2012 (1) SACR 292 (SCA), the appellants appealed against their conviction and sentence, and applied for an extension of their bail pending the finalisation of their appeal. While the trial court allowed the appeal against their conviction and sentence, their application for their bail to be extended was refused.

An application for bail after conviction is regulated by section 321 of the CPA. In terms of this provision, a trial court is only obliged to suspend the execution of the sentence by reason of an appeal, if it is of the opinion that it is fit, under the circumstances, to order that an accused be released on bail. In order for the trial court to make a determination in terms of section 321 of the Criminal Procedure Act, the accused must apply for bail and present the facts necessary to enable the court to exercise its discretion (para [13]). The fact that an appeal against the conviction was granted, which implies that there is a reasonable chance of success on appeal, is not, on its own, sufficient to entitle an appellant to be released on bail pending the appeal. More important factors to consider include the seriousness of the crime, the flight risk the appellant presents, and the real prospects of success of the appeal, as well as the real prospects that a non-custodial sentence may be imposed (para [14]). The trial judge is the person best equipped to deal with the issue (para [15]).

In this matter, however, the trial judge had failed to give reasons for granting leave to appeal against the conviction and sentence. This made it difficult to assess whether the appellants had any real prospect of success on the merits of their case (paras [16]–[18]).

Does a deceased accused who fails to appear for his/her bail hearing forfeit his bail?

The South Gauteng High Court (Johannesburg) was confronted with a peculiar question in *S v Engelbrecht* 2012 (2) SACR 212 (GSJ). The accused was released on bail pending his trial for the murder of his wife and paraplegic son. He later died in a road accident — his cause of death was recorded as 'unnatural', as it

was believed that he had committed suicide (para [3]). The question was whether the accused had forfeited his bail by failing to appear at his criminal trial (s 67 of the CPA).

In terms of section 67(1) of the CPA, three consequences follow if an accused released on bail fails to appear for his/her criminal trial: the court must declare the bail provisionally cancelled, the bail money must be provisionally forfeited to the state, and a warrant for the accused's arrest must be issued. These actions are, however, absurd where it is known that the accused is dead and is therefore no longer at liberty on bail, or able to appear before the court (para [7]). It was consequently held that a deceased accused, released on bail pending criminal proceedings, does not forfeit the bail money paid, irrespective of whether he or she died from natural or unnatural causes (paras [14]–[15]).

Breach of Parole Conditions

The applicant in *Ntontela v Minister of Correctional Services & others* 2012 (2) SACR 487 (GSJ), was convicted of contravening provisions of the Attorneys Act 53 of 1979 and sentenced to three years' imprisonment. He was then granted parole, subject to conditions, before the expiry of his sentence in terms of section 73(4) of the Correctional Services Act 111 of 1998. The parole conditions included that the applicant report to a correctional supervision official once a month, and that he adhere to compulsory periods of house detention during which he was not allowed to leave his primary residence (para [6]).

As the applicant did not comply with these conditions, the respondents issued a warrant for his arrest under section 70(1) of the Correctional Services Act. Section 70(2)*(b)* of the Act provides that where a person has been arrested and is detained in terms of such an arrest, he or she must be brought before a court within 48 hours of arrest. The court must then order the further detention of that person and refer the matter to the responsible authority (para [9]). In this matter, however, the applicant did not appear before a court, and no court order was made with regard to his further detention or referral to an appropriate authority (para [10]). Instead, within 48 hours of his arrest, the applicant was returned directly to prison where he appeared before a supervision committee (para [12]). On the recommendation of this committee, the applicant's parole was cancelled in terms of section 75(2)*(a)* of the Correctional Services Act (para [13]).

Satchwell J for the South Gauteng High Court (Johannesburg),

described the revocation of the applicant's parole as the 'withdrawal of an indulgence'. 'The indulgence was one granted by the Department of Correctional Services in respect of a criminal sanction imposed by a court of law. All the Department of Correctional Services, ie the National Commissioner through his servants, has done is to restore the position to that which it was, prior to exercising its discretion to grant an early release on parole. . .' (para [22]). It was further held that the court has no power to usurp the authority of the supervision committee or the Correctional Services Parole Board, or to interfere with the actions taken or the decisions made by these authorities (para [25]).

Correction of a Sentence in Terms of Section 298 of the Criminal Procedure Act 51 of 1977

The accused in *S v Matshiba* 2012 (1) SACR 577 (ECG), pleaded guilty and was convicted of six counts of housebreaking with intent to steal and theft, as well as a seventh count of theft. He was sentenced to ten years' imprisonment on each of the first six counts and to two years' imprisonment on the seventh count. The sentences were *not* ordered to run concurrently, and the appellant consequently had to serve an effective sentence of 62 years' imprisonment (para [2]). Twenty-one days after imposing the sentence, the magistrate ordered that the sentences on the first five counts run concurrently, imposing a sentence of an effective 22 years' imprisonment (para [3]).

In terms of section 298 of the CPA, a presiding officer who has imposed a wrong sentence can amend it before, or immediately after it has been recorded. This provision does not, however, empower a court to alter the sentence if the of the amendment changes the content or general meaning of the sentence. Once a court has imposed a sentence, it is *functus officio* and the sentence cannot be changed (para [8]).

In this instance, the amendment was not made immediately before or after the recording of the sentence, and the amendment imposed additional terms to the original sentence. It was consequently held that the magistrate's alteration of the sentence did not comply with the provisions of section 298 of the CPA (para [12]).

The duty of Police Investigators and Prosecutors with Regard to the Arrest and Detention of Suspects and Accused

The plaintiffs in *Botha v Minister of Safety and Security and others; January v Minister of Safety and Security and others* 2012

(1) SACR 305 (ECP), were arrested without a warrant on a charge of murder on 16 March 2008, and were detained in custody until their first appearance in court on 19 March 2008. They were then remanded in custody until 18 April 2008, at which time Botha was released on bail, and the charges against January were withdrawn. The plaintiffs claimed damages from the defendants for their alleged unlawful arrest and detention up to 19 March 2008, as well as their further detention until their release on 18 April 2008.

The plaintiffs argued that the arresting officer and/or the other policemen involved, knew or should have known that there were no reasonable, objective grounds or justification for their detention. It was also argued that the defendants had failed in their duty to inform the relevant prosecutors dealing with the matter that there were no grounds or justification for the detention, and indeed no objective facts reasonably linking the plaintiffs to the alleged murder (para [4]). It was further argued that the prosecutors involved had failed in their duty to acquaint themselves with the contents of the police docket which showed clearly that there were no reasonable grounds or justification for the plaintiffs' continued detention. It was submitted that the prosecutors had failed to withdraw the charges against the plaintiffs timeously, and had failed to inform the presiding officer expeditiously that there were no objective facts reasonably linking the plaintiffs to the alleged murder. It was also argued that the prosecutors had a duty to ascertain independently that no reasonable grounds or justification existed for the continued detention of the plaintiffs, and had failed to take steps to ensure that the plaintiffs were released from detention as soon as possible (para [5]).

The defendants argued that, apart from placing a fair and honest statement of the relevant facts before the prosecutor, an investigating officer has no legal duty to make representations to a prosecutor on the grounds or justification for the continued detention of an awaiting trial prisoner who has appeared before a court. It was argued that at that point, it is the prosecutor who is solely responsible for objecting to the release of an awaiting trail prisoner and to make representations to the presiding officer on the further detention of an accused (para [6]).

The court was not convinced by this argument. It held that there is a duty on the state and *all* its organs not to perform any act that infringes on any person's fundamental rights, including their right to freedom and security of the person (s 12 of the

Constitution, 1996). Police officers must, furthermore, exercise their powers in accordance with section 13 of the South African Police Service Act 68 of 1995, which provides that official action is subject to the Constitution and must be performed with due regard to every person's fundamental rights (para [19]). Police officers must, therefore, assess and evaluate whether there are grounds or justifications for a suspect or accused's further detention (para [27]). Police officers also have a legal duty to inform prosecutors of information which would justify the further detention of suspects and/or the accused (para [30]). This is important because it is the assessment of police officials on whether a detention is justified, that will ultimately enable the prosecutor and the presiding officer to make an informed decision whether there is any legal justification for the further detention of a suspect/accused (para [30]).

Similarly, prosecutors are obliged to establish the facts of the case which would justify the further detention of a suspect or accused (para [33]) And, where the police docket does not include information justifying the further detention of such individuals, the prosecutor has a duty to establish from the investigator, facts which would justify such further detention (para [34]). This duty on the prosecution to place all relevant facts before a court, was also emphasised in *S v Sithole & others* 2012 (1) SACR 586 (KZD) in an appeal on an application for bail; and again in *S v Nhlapo* 2012 (2) SACR 358 (GSJ) with regard to proof of previous convictions by way of an SAP69 form, and for the purpose of sentencing proceedings.

Guidelines for Enquiries in Terms of Section 77 of the Criminal Procedure Act 51 of 1977

The accused in *S v Matu* 2012 (1) SACR 68 (ECB), was charged with assault with intent to do grievous bodily harm. He was referred for mental observation and the prosecutor subsequently submitted the psychiatric evaluation in accordance with section 79 of the CPA. In this report, the accused was diagnosed with, *inter alia,* 'psychotic disorder' (an Axis 1 diagnosis). The section 79 panel also concluded that the accused was unable to follow court proceedings so as to offer a proper defence, and that he had most probably been mentally ill when he committed the offence and woul therefore have been unable to appreciate the wrongfulness of his actions. It was recommended that the accused be dealt with as a state patient in terms of section 77(6) of

the CPA, and that he be detained until discharged by a judge in accordance with section 47 of the Mental Health Care Act 17 of 2002 (para [7]).

The magistrate consequently held a section 77 enquiry in the absence of the accused's legal representative, and despite the severe consequences that a section 77 enquiry held for the accused. (The consequences of a s 77 enquiry can be servere as an accused can be detained indefinitely depending on the outcome, not as a result of his actions, but due to a lack of understanding and an inability to make a proper defence (para [12], see also *S v Zondi* 2012 (2) SACR 445 (KZP).)

In the *Matu* case, the magistrate committed a number of errors: First, she made a determination on whether the accused was capable of understanding the proceedings and making a defence *before* she continued with the section 77 enquiry;she did not establish whether the section 79 report was disputed; she merely accepted that the prosecutor accepted the section 79 report; and she failed to ask the accused whether he wished to dispute the finding (para [14]). The magistrate also, erroneously, ordered that the accused be admitted and detained in an institution as an involuntary mental health care user under section 37 of the Mental Health Care Act, based on his denial of guilt and on the superficial questioning that she had conducted (para [17]).

Based on the fundamental errors that the trial magistrate had made in this section 77 enquiry, the review court formulated the following guidelines for section 77 proceedings

- First, a court must consider whether the section 79 report is compliant with the provisions of that section in all the necessary respects.
- Next, it should consider the import and effect of the findings of the panel, and whether these findings were made unanimously. The court must also establish whether the report is disputed by either the prosecutor or the accused, and note the responses of both parties on the record.
- If the report reflects the unanimous finding of all members of the panel, and is not disputed by either the prosecutor or the accused, the court may proceed to determine the matter based on the report and without hearing further evidence.
- However, where the finding of the panel is not unanimous, or is disputed by the prosecutor or the accused, the court should invite the parties to adduce evidence on the basis set out in

section 77(3), and the court must offer any assistance necessary with regard to the issue of subpoenas, etc. The court should also invite and allow the accused if he or she wishes and is able to do so, to testify and to cross-examine all the witnesses.

- If the report states that the accused is capable of understanding the proceedings and presenting a proper defence, it should make a determination in terms of section 77(5) that the proceedings be continued in the ordinary way.
- If the report states that the accused is not capable of understanding the proceedings and making a proper defence, the court must make a determination in terms of section 77(6).
- The court must make its determination on a balance of probabilities whether in terms of subsection (5) or (6).
- Where a determination is made in terms of subsection (6), the court must establish if it can be proved, on a balance of probabilities, that there is evidence available that the accused committed the offence. Alternaty, it should consider whether it is necessary to invoke its discretion to order that evidence be placed before it to determine the issue. It is, however, important that evidence is placed before the court linking the accused to the offence with which he or she is charged (*S v Dewhurst* 2012 (1) SACR 627 (ECP)).
- After hearing evidence or making a value judgment as the case may be, the court should determine whether the accused committed the offence based on the strength of assurances given with regard to the available evidence.
- Allied to the question of whether the accused committed the act in question, the court should also establish whether the act resorts under the first category (a serious offence), or is a less serious (non-violent) offence. With a serious and violent offence a directive in terms of section 77(6)*(a)*(i) must be issued on form MC20, and for a non-violent offence, a directive must be issued in terms of section 77(6)*(a)*(ii) on form MC21 (para [29]).

Where the accused is charged with a serious offence like murder, culpable homicide, rape, or any other offence involving serious violence, the court should order that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act 2002 (section 77(6)*(a)*(i)). For all other

offences the court must order that the accused be detained in an institution as an involuntary mental health care user as contemplated in section 37 of the Mental Health Care Act, 2002, (section 77(6)*(a)*(ii)).

The court's finding and order in terms of the Mental Health Care Act is furthermore dependent on the provisions of section 77(6) with regard to the finding whether the accused is actually guilty of the offence with which he or she is charged (para [18]). As regards this finding, it is important to note that the accused's guilt need only be established on a balance of probabilities and is not subject to the criminal burden of beyond a reasonable doubt (para [21]). However, this finding must still provide the necessary jurisdictional basis for the next stage of the enquiry, which is to determine whether the act committed falls under either section 77(6)*(a)*(i), a serious offence, or section 77(6)*(a)*(ii), a less serious (non-violent) offence (para [21]).

In *Matu*, the magistrate was incorrect in finding that the accused should be detained in terms of section 37 of the Mental Care Act. The evidence showed, on a balance of probabilities, that the accused indeed committed an offence of a violent nature, and based on this he should have been detained under section 47 of the Mental Care Act (para [27]). It was also held that a substantial injustice had resulted from the accused's being unrepresented at the enquiry.The matter was remitted back to the magistrate to be reheard (para [28]). See also *S v Sikutu* 2012 (2) SACR 342 (ECB) which deals with section 78 of the CPA, and where it was alleged that, at the time of the commission of the offence, the accused was not able to appreciate the wrongfulness of his actions and to act accordingly. Here the court emphasised that expert evidence is required for a court to make a determination in this regard.

Immovable Property as an Instrumentality of an Offence and Subject to a Forfeiture Order

In *Van der Burg & another v National Director of Public Prosecutions & another* 2012 (2) SACR 331 (CC), the applicants — a married couple with three children — ran an illegal shebeen from a residential property of which they were the registered owners. They had previously applied for a liquor licence without success as there were four licensed liquor outlets within a radius of 400m of the property. Their neighbours had also complained

repeatedly about the shebeen and the negative impact it had on the neighbourhood (para [11]). There had been more than 50 police actions and eighteen arrests recorded against the property, together with numerous oral and written warnings (para [12]). As these actions had had no effect, the National Director of Public Prosecutions (NDPP) was granted a provisional preservation order against the property. When the applicants continued with their unlawful activity despite this provisional preservation order, the NDPP applied for, and was granted, a forfeiture order against the property in terms of section 50(1)*(a)* of the Prevention of Organised Crime Act 121 of 1998 (para [15]).

The applicants appealed against this forfeiture order, arguing that their residence could not be an instrumentality of an offence as envisaged in POCA, as the illegal sale of liquor is not an offence in terms of Chapter 6 of POCA which relates only to 'organised crime offences' and not criminal activity by individuals. They also argued that the forfeiture was 'manifestly disproportionate' to the offence they had committed (para [16]). The applicants further relied on their constitutional right to access to adequate housing, and argued that the rights of their children would also be infringed should the forfeiture order be upheld (para [26]).

In a majority decision for the Constitutional Court, Van der Westhuizen J found that the illegal sale of liquor was indeed an offence falling within the ambit of POCA. The provisions of POCA are designed to reach far beyond organised crime, and apply equally to cases of individual wrongdoing (para [35], *National Director of Public Prosecutions v Van Staden* 2007 (1) SACR 338 (SCA)). It was held that '. . .although POCA does not explicitly identify the unlawful activity or offence at issue in this matter, the ex facie language of the statute, as well as its aims, suggest that its forfeiture provisions do apply to the property at which the unlawful selling of liquor occurs' (para [38]).

In considering the proportionality requirement of the forfeiture order, the court noted the numerous attempts by the authorities to use conventional law enforcement strategies to curtail the applicants' illegal activities. It was clear from the evidence presented, that the forfeiture sought was a last resort to end to the criminality '. . .by removing the main instrument used in its commission' (para [51]). It was further held that while the illegal sale of liquor is not necessarily 'organised crime' or generally regarded as a serious crime, the way in which it had been committed, together

with the harm its commission had caused many in the applicants' neighbourhood (including their own children) '. . .must result in a conclusion that forfeiture is proportionate and appropriate in this case' (para [56]).

With regard to the imminent consequence that the applicants and their children would be left homeless should the forfeiture order succeed, the Constitutional Court found that their monthly income from selling fruit and vegetables would enable them to rent another residence and support their children. And, in weighing up the best interests of the applicants' children as per section 28(2) of the Constitution, it was held that it was not in their best interests to be exposed to the applicants' illegal activities in their own home, and that a Children's Court should determine whether the applicants' children are in need of care and protection as per section 47(1) of the Children's Act 38 of 2005 (para [79). It was consequently confirmed that the residential property of the applicants be forfeited to the state in terms of POCA (para [83]).

Juvenile Offenders

Incarceration as an appropriate sentence for a juvenile offender

In *S v BF* 2012 (1) SACR 298 (SCA), the appellant was convicted of robbery with aggravating circumstances and rape, and was sentenced to fifteen and ten years' imprisonment respectively; an effective term of fifteen years' imprisonment. On appeal, the court had to consider whether the trial court had misdirected itself in imposing such a lengthy custodial sentence on a juvenile who was fourteen years and ten months of age when he committed the offences.

It was contended by the appellant that the applicability of subsections 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, was first raised at sentencing. And, the failure to promptly and pertinently bring these provisions of the Minimum Sentencing Act to the attention of the accused sooner rather than later, may preclude their application in this instance. It was also held that section 51(6) of the Act explicitly prohibits the application of subsections 51(1) and (2) to a child under the age of sixteen years at the time of the commission of the offence in question. This, the trial court had overlooked. Reference was also made to the constitutional imperative of section 28(1)(g) which provides that juveniles should be incarcerated as a measure of

last resort, and may be detained only for the shortest possible period (para [15]).

However, based on the wording of this constitutional provision (that juveniles *may* be incarcerated), it was held that the law does not prohibit the incarceration of children, but that all the factors of the particular case ought to be taken into consideration. In this instance, the seriousness of the crimes of which the appellant was convicted required that his youthfulness be balanced against the interests of society, the interests of the victim, and the deterrent and retributive elements that a just punishment required. The appellant's youthfulness also required that the punishment include a strong rehabilitative component (para [8]). It was found that the only factor that counted in the appellant's favour was his relatively young age (para [13]), and that the seriousness of the offences, its cumulative effect, and the fact that the appellant and his co-accused had pre-planned their illegal actions, convinced the court that a custodial sentence was the only appropriate sentence in the circumstances (para [14]). However, given the requirement of section 28(1)(g) of the Constitution that juveniles be incarcerated for the shortest period possible, the sentence was amended to ten years' imprisonment for the robbery, and twelve years' imprisonment for the rape. These sentences were ordered to run concurrently and the appellant was to serve an effective twelve years' imprisonment.

See also *S v L* 2012 (2) SAR 399 (WCC), *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and others* 2012 (1) SACR 423 (SCA), and *S v RS* 2012 (2) SACR 160 (WCC). In the latter case it was emphasised that due cognisance be given to the provisions of the Child Justice Act, and specifically Chapter 10, before a sentence is imposed on a juvenile offender. In *S v Gani NO* 2012 (2) SACR 468 (GSJ) and *S v MK* 2012 (2) SACR 533 (GSJ), it was emphasised that, where appropriate, diversion must always be considered in terms of section 53 of the Child Justice Act 75 of 2008.

Reviewability of a sentence in terms of sections 76 and 85 of the Child Justice Act 75 of 2008

In *S v CS* 2012 (1) SACR 595 (ECP), the accused (who was seventeen years of age) was convicted of contravening the provisions of sections 66(2) and 89(1) of the National Road Traffic Act 93 of 1996, ie using a motor vehicle without the consent of the owner. The accused was also convicted of housebreaking with

the intent to steal and theft. For the purposes of sentencing, the two counts were taken together and the accused was sentenced in terms of sections 76(1) and 71(3) of the Child Justice Act 75 of 2008, to compulsory residence in a child-and-youth care centre for a minimum period of two years (para [2]). The primary question was whether the matter qualified for automatic review under section 85 of the Child Justice Act 75 of 2008.

Section 85 of the Act requires the automatic review, in terms of section 304 of the CPA, of all cases where the child was under the age of sixteen years at the time of the alleged offence, or was sixteen years or older, but under the age of eighteen years, and was sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child-and-youth care centre providing programmes as referred to in section 191(2)(j) of the Children's Act. However, the trial magistrate questioned whether this automatic review procedure applies in cases where the child is legally represented (para [7]).

Tshiki and Beshe JJ for the Eastern Cape High Court, Port Elizabeth, confirmed that legal representation for all minors in a Child Justice Court is compulsory, and the working of section 85 is consequently not dependent on the absence of legal representation for the child at the trial and sentencing phase of the proceedings (para [11]). It was also held that section 85 will apply irrespective of the length of the sentence imposed or whether it was imposed by a magistrate or a regional magistrate (para [20]). The automatic review envisaged in section 85 of the Child Justice Act 75 of 2008 is an exception and is not conducted in terms of section 302 of the Criminal Procedure Act 51 of 1977, and therefore need not meet the requirements of that section. For a conflicting judgment on this issue see *S v Jan Nakedi* (unreported case 12/2011 North West High Court 2 January 2012 *per* Gutta J, Landman J concurring).

Life Imprisonment and the Transitional Provisions of Section 136 of the Correctional Services Act 111 of 1998

Prison administration, and more specifically community corrections, in South Africa are currently governed by the Correctional Services Act 111 of 1998, and where applicable, its predecessor, the Correctional Services Act 8 of 1959, together with the relevant policies and guidelines under each of these Acts (*Van Vuren v Minister of Correctional Services & others* 2012 (1) SACR 103 (CC) para [24]). The previous parole regime was prescribed in

sections 63 and 65 of the Correctional Services Act of 1959, and remained in force in the same form from 1993 until 1 October 2004. These provisions did not provide for minimum detention periods to be served before a prisoner could be considered for release on parole. Such minimum detention periods were rather prescribed by ministerial policy and varied from time to time (para [89]). From 1987 to 1994, for example, offenders could — absent exceptional circumstances — be considered for release on parole after they had served ten years of their life imprisonment term. Such prisoners were, however, rarely released before having served fifteen years of their sentence. This minimum detention period was increased to twenty years in March 1994 (para [89]), and it was recommended that prisoners who had attained 65 years of age be considered for parole after having served fifteen years of their sentences (para [25]).

The process for prisoners serving life sentences under the 1959 Act, required a Parole Board to submit a report to the Minister of Correctional Services, or to the Commissioner of Correctional Services, on the eligibility of a prisoner to be considered for release on parole (s 63(1)). The Minister or the Commissioner then referred the report to the National Advisory Council for Correctional Services, which made a final recommendation to the Minister on whether or not the prisoner should be released on parole (para [88]). For prisoners serving determinate sentences, the Commissioner decided on parole (para [90]).

Two new parole processes came into operation under the 1998 Act, the first on 1 October 2004, and the second towards the end of September 2009 (para [91]). In terms of the first, the Correctional Supervision and Parole Board made a recommendation to the court on whether a particular prisoner serving a life sentence was eligible to be released on parole (para [92]). Today, however, the latest parole process requires that the Case Management Committee (CMC) of each correctional institution submit a report to the Correctional Supervision and Parole Board, which has replaces the Parole Board under the 1959 Act. This Board is appointed by the Minister of Correctional Services and makes a recommendation to the Minister on the granting of parole in respect of an offender serving life incarceration (para [26]).

The 1998 Act also provides for minimum detention periods to be served before a prisoner can be considered for release on parole. Section 73(6)*(b)*(iv) of this Act provides that prisoners serving life sentences may not be placed on parole until they

have served at least 25 years of their sentence, or, if such prisoners have attained the age of 65 years, after having served at least fifteen years of their sentence (para [30]). On 19 February 1999, before the new Act came into operation, transitional provisions were enacted, the most important of which for present purposes, is section 136, which came into operation on 14 December 2001.

Section 136(1) provides that any person serving a sentence of imprisonment immediately before the commencement of Chapters IV, VI and VII, is subject to the provisions of the previous Act for placement under community correction. Such a prisoner will, therefore, be considered for release and placement on parole by the Correctional Supervision and Parole Board, in terms of the policy and guidelines applied by the former Parole Board before the commencement of the relevant chapters of the 1998 Act (para [31]). Section 136(3)*(a)*, on the other hand, provides that prisoners serving life imprisonment immediately before the commencement of Chapters IV, VI and VII, are entitled to be considered for day parole after having served twenty years of their sentence.

In *Van Vuren v Minister of Correctional Services & others* 2012 (1) SACR 103 (CC), the proper interpretation of this transitional provision (s 136(3)*(a)* of the Correctional Services Act 111 of 1998) was considered. The applicant had been convicted on various charges in 1992, and sentenced to death alongside two sentences of five years' and three years' imprisonment for theft and possession of an unlicensed firearm and ammunition, respectively. On 20 September 2000, however, following the abolition of the death penalty in *S v Makwanyane & another* 1995 (3) SA 391 (CC), the applicant's death sentence was commuted to incarceration for life antedated to 13 November 1992, the date on which applicant had been sentenced and in accordance with section 1(11) of the Criminal Law Amendment Act 1997. The applicant's determinate sentences were to run concurrently with the life sentence (para [6]).

Upon learning of the outcome in the case of *Plank v Minister of Correctional Services and others* (GSJ case No 2005/14313 [no date] unreported), the applicant in the *Van Vuren* case enquired about his prospects of being considered for release on parole. In the *Plank* case, the applicant had been sentenced to death on 6 March 1990, and his sentence commuted to life imprisonment on 7 August 2003. Plank was eventually considered for parole (in terms of an out of court settlement) after having served only

thirteen years of his life term, and in terms of the criteria, policies and statutes that applied in 1990 when he was sentenced to death. However, upon *Van Vuren's* enquiry, the Provisional Commissioner of Correctional Services informed him that he could only be considered for parole after having served twenty years of his sentence, and that no amnesties and credits (which were considered in terms of the previous parole regime) would play a role in the assessment process. The Commissioner also advised that prisoners serving sentences of life imprisonment from 1959 to 1994, would be considered for parole after having served ten years of their sentences (para [7]).

Van Vuren, however, argued that the words 'policy and guidelines' in section 136 of the new Act, must be construed as referring to policy and guidelines operative at the time when he was originally sentenced in 1992. And, that these policies and guidelines made him eligible for consideration for placement on parole after having served ten, but not more than fifteen years of his sentence (para [14]). The High Court (*Van Vuren & others v State* GNP case No A682/2000, 20 September 2000), however, found that section 136(3)*(a)* overrides section 136(1) and the policy and guidelines referred to therein. Section 136(1) was held to apply to all prison sentences except life imprisonment, and section 136(3)*(a)* specifically to prisoners serving life imprisonment (para [15]).

Interpreting section 136, the Constitutional Court focused on an holistic reading of all the relevant provisions of the new Act. First, it held that section 73(6) now requires that all prisoners sentenced to life imprisonment serve 25 years of their sentence before being considered for release on parole. This section applies to all sentences passed after the commencement of the new Act (para [59]). For those prisoners sentenced to life imprisonment during the period 1 March 1994 to 3 April 1995 when the twenty year pre-parole minimum was introduced, section 136(3)*(a)* preserves an entitlement to be considered for release on parole after having served twenty years of their sentence. Finally, section 136(1) preserves the position of those sentenced to life incarceration even earlier, before 1 March 1994. Van Vuuren fell into this category (para [59]).

This conclusion was reached on the basis of the two phrases 'immediately before' and 'prior to' in section 136(1). It was held that '. . .the adverbial phrase of time "immediately before" refers to the category of persons serving custodial sentences'. And, the

phrase 'prior to' refers to the applicable policy and guidelines (para [57]). It was further held that 'prior to' has a broader meaning than 'immediately before', and refers to all the applicable policies and guidelines at any time before 2004 when Chapters IV, VI and VII came into effect (para [57]). Section 136(1), therefore, preserves the policies and guidelines applied by the former Parole Board before 2004 (para [58]).

With specific reference to Van Vuren's sentence, it was held that section 136(1) preserves the policies and guidelines in existence in 2000 when Van Vuren's death sentence was commuted to life incarceration, and which required that a minimum period of twenty years' imprisonment be served before consideration of release on parole (para [64]). However, Van Vuren's sentence was also backdated to 13 November 1992, when he was first sentenced, an advantage granted Van Vuren by a full court which cannot be taken away arbitrarily (para [64]). By antedating the sentence, the full court gave Van Vuren the privilege of being considered for placement on parole in terms of the policies and guidelines applicable in November 1992. In terms of these policies and guidelines, Van Vuren was eligible for parole after having served ten years of his life sentence, although placement before fifteen years occurred in exceptional circumstances only (para [66]). It was consequently held that Van Vuren was eligible for consideration for parole under section 136(1) of the Correctional Services Act 111 of 1998 (para [70]).

The majority for the Constitutional Court found that section 136(3) applies only to offenders sentenced after March 1994, and that section 136(1) applies to all offenders serving determinate sentences, as well as those serving life imprisonment who were sentenced before March 1994 (para [137]).

However, in a minority judgment, Yacoob J and Ngcobo CJ argued that offenders should rather be considered for parole in terms of the policies, guidelines, and procedures applicable at the date of parole consideration (para [84]). They rightly held that: 'The idea that a person sentenced in 1974 must be considered for parole in 1994 in terms of the policies applicable in 1974 cannot be accepted. Indeed the policies and guidelines must be determined in terms of societal conditions at the time that parole applications are considered, not at the time that the offenders concerned were sentenced' (para [139]). Yacoob and Ngcobo interpreted section 136 of the Correctional Services Act 111 of 1998 as providing for prisoners serving determinate

sentences under subsections (1) and (2), and prisoners serving life sentences under subsections (3) and (4). Subsections (3) and (4), therefore, qualify subsections (1) and (2) by limiting their application to prisoners not serving a life sentence. In reaching this conclusion, Yacoob and Ngcobo emphasised the textual differences between the four subsections; subsections (1) and (2) refer to 'release and placement' which suggests prisoners serving a determinate sentence, while subsections (3) and (4) use the phrase 'to be considered for day parole and parole' which suggests prisoners serving life sentences (para [121]). In subsections (2) reference is made to '. . . a prisoner who is serving a determinate sentence of imprisonment as contemplated in subsection (1)' which clearly shows that subsection (1) is restricted to offenders serving a determinate sentence (para [132]). It was also held that if section 136(1) applied to all sentenced offenders, the parole procedure for all sentenced offenders would be identical. There is no reason why the legislator would abolish the differentiation (as described above) for the transitional period, and then reinstate it at the end of the transition (para [127]).

The minority judgment also criticised the majority for '. . . [coming] close to rewriting the legislation and hence [conferring] upon legislative bodies powers and duties those bodies do not have' (para [130]). While the majority recognised the difficulties with finding that section 136(1) applies to offenders serving life sentences, this did not convince them that section 136(1) does not apply to prisoners, like Van Vuuren, serving life sentences. The majority, it was held, failed to establish what body was to consider such parole applications. They merely equated the Correctional Supervision and Parole Board with the current Case Management Committees, and required the latter to submit a report to the National Council, even though the Case Management Committees are strictly limited to prisoners serving determinate sentences and have no power over prisoners serving life sentences (para [130]). The role of the National Council was also completely disregarded in the process, even though it is required to make a recommendation to the Minister with regard to the eligibility of a prisoner serving a life sentence to be released on parole (para [131]).

In my view, the minority judgment in the Van Vuren case and its interpretation of the transitional provisions in section 136, is consonant with the development of the Correctional Services legislation, and provides a bridge between the old and new parole regimes (para [140]).

See also *Derby-Lewis v Minister of Correctional Services* 2009 (2) SACR 522 (GNP), and *Van Wyk v Minister of Correctional Services & another* 2012 (1) SACR 159 (GNP), which dealt with the preservation of the policies and guidelines provided for in section 22A of the 1959 Act which allowed for the allocation and accumulation of credits by prisoners based on their observance of the rules of the correctional institution, and their active participation in programmes aimed at their treatment, training, and rehabilitation. These credits were, and can to a limited extent and within the framework of section 136 of the 1998 Act still be, taken into account when determining the date on which a parole board may consider the placement of a prisoner on parole (para [8]).

The National Road Traffic Act 93 of 1996

Duplication of punishment

The appellant in *S v Kriel* 2012 (1) SACR 1 (SCA), was convicted of driving under the influence of liquor in contravention of section 65(1)*(a)* of the National Road Traffic Act 93 of 1996, and two counts of culpable homicide. The two counts of culpable homicide arose from two people having died in a collision the appellant had caused whilst driving in his intoxicated condition. The appellant was sentenced to six years' imprisonment for contravening section 65(1)*(a)* of the National Road Traffic Act 93 of 1996, and to eight years' imprisonment on the two counts of culpable homicide. Two years of this eight-year term were suspended for five years on condition that he was not again convicted on a charge of culpable homicide involving a motor collision. The appellant's driving licence was also suspended for a period of two years, and he was declared unfit to possess a firearm licence in terms of section 103(1) of the Firearms Control Act 60 of 2000.

However, three days after sentencing, the magistrate indicated that there had been an oversight on his part, and that the terms of imprisonment were to run concurrently, resulting in an effective term of six years' imprisonment. However, recognising that he was *functus officio*, the magistrate also expressed concern about his competence to rectify the sentences and the matter was referred to the KwaZulu-Natal High Court on urgent, special review.

On review, it was held that a duplication of punishment had taken place in this matter as the magistrate also considered the

two counts of culpable homicide when he imposed the maximum sentence of six years' imprisonment on count 1 — the conviction in terms of section 65(1)*(a)* of the National Road Traffic Act 93 of 1996. First offenders convicted for driving under the influence of alcohol are generally not sentenced to direct imprisonment but to a fine, or alternatively to imprisonment of which a portion is suspended. The magistrate therefore ought to have made a clearer distinction between the three counts when he imposed sentence.

Disqualification from obtaining a driver's licence

The statutory provisions of the National Road Traffic Act dealing with the suspension and disqualification of an offender's driver's licence or permit were considered in a number of cases in 2012.

Section 34(1) provides that a court may, subject to section 35, and in addition to imposing a sentence, issue an order suspending the offender's driver's licence or permit or, disqualifying that offender from obtaining a driver's licence or permit. Section 35(1), on the other hand, provides for compulsory minimum periods of suspension of an offender's driver's licence and/or permit where he or she has been found guilty of certain offences in terms of sections 61, 63 and 65 of the National Road Traffic Act. While subsections 34*(a)* and *(b)* allow courts a discretion to suspend an offender's driver's licence, section 35(1) mandates the compulsory suspension of a driver's licence for certain minimum periods in the case of the commission of certain offences and with due consideration of previous offences. Section 35(3) of the Act further provides that if the court is satisfied that the circumstances surrounding the offence do not justify the suspension or disqualification of the offender's driver's licence and/or permit, it may order that suspension or disqualification not take effect.

In S v *Vekeni* 2012 (1) SACR 458 (ECG), the accused was convicted of a contravention of section 65(2)*(a)* of the National Road Traffic Act 93 of 1996 for driving a motor vehicle on a public road when the concentration of alcohol in his blood was not less than 0,05 grams per 100 millilitres of blood, specifically 0,29 grams. The accused was sentenced to two years' imprisonment in terms of section 276(1)(i) of the CPA. The magistrate made an order in terms of section 34(1)*(c)* of the National Road Traffic Act in terms of which the accused was disqualified from obtaining a driver's licence or permit for a period of ten years from the date of sentencing (para [7]).

However, the record reflected that the magistrate merely explained the provisions of section 35(1) of the National Road Traffic Act which provides that an offender's driving licence or permit may be suspended, and that he or she may be barred from obtaining a licence for a period of at least ten years for a third or subsequent offence. This provision was relevant to the accused's case as he already had two previous convictions under the National Road Traffic Act. The magistrate did not explain subsections 35(2) and (3) to the accused. The accused did not give testimony under oath, but merely addressed the court (para [11]).

It was submitted that had the accused been informed of subsections 35(2) and (3),he may have elected to give evidence under oath and request that the suspension and disqualification not take effect (para [10]). The order made in terms of section 34(1)*(c)* was consequently set aside and the matter referred back to the trial court (para [12]).

In *S v Van Rooyen* 2012 (2) SACR 141 (ECG), the magistrate ordered that the appellant's driving licence be suspended for a period of five years in terms of section 35(1) of the National Road Traffic Act 93 of 1996. The appellant was charged with and convicted of a contravention of section 65(2)*(a)* read with section 89(1) of the Act, driving a motor vehicle on a public road when his blood alcohol was in excess of the statutory limit (para [1]). In suspending the appellant's driver's licence, the magistrate also took into account the appellant's previous conviction in terms of section 65(1)*(a)* of the Act, viewing the appellant's current conviction as his second offence (para [5]). The appellant argued that this was a misdirection as subsections 65(1) and 65(2) created two separate offences, and his present conviction in terms of section 65(2) could not, therefore, be regarded as a second offence simply because it was an alcohol related driving offence similar to the offence created in section 65(1) of the Act (para [13]). The primary question in this case was, therefore, whether the compulsory suspension of an offender's driving licence for the minimum periods set out in section 35 of the Act are aimed at repeat offenders of the same offence, or repeat offenders of similar or related offences (para [17]).

Van Zyl and Mjali JJ for the Eastern Cape High Court (Grahamstown), held that from the wording of the Act it was clear that a conviction for an offence listed in section 35(1) of the Act constituted a 'first', 'second' or 'third or subsequent' offence for the purposes of subsections 35(2) and (3) (para [20]).

> It is the conviction of an offence mentioned in ss (1) that constitutes the 'first', 'second' or 'third or subsequent offence' . . . whether or not such a conviction constitutes a second or subsequent conviction is to be determined with reference to the nature of the offender's prior conviction. If they correspond, then the later conviction constitutes a second offence for the purpose of s 35(1) (paras [20]–[21]).

In this particular case it was found that the appellant's conviction was, for the purposes of section 35(1), a first offence and the magistrate's order in this regard was consequently set aside (para [28]).

Proof of contravention in terms of section 65(1)(a) of the National Road Traffic Act 93 of 1996

In *S v Mzimba* 2012 (2) SACR 233 (KZP), the accused pleaded guilty to a charge of contravening section 65(1)*(a)* of the National Road Traffic Act 93 of 1996. However, the reading of a breathalyzer result was not submitted to the court, and during questioning under section 112(1)*(b)* of the CPA, the accused did not admit that his driving had been affected by the liquor he had consumed (paras [5]–[6]).

On automatic review under of section 302 of the CPA, it was emphasised that an accused must admit to all the elements of the offence with which he is being charged. It was, therefore, not enough that the accused had admitted to having consumed liquor, he should also have admitted that this had influenced his ability to drive (para [6]). The conviction and sentence were consequently set aside, and the matter was remitted to the court *a quo* for a plea of not guilty to be entered in terms of section 113 of the CPA (para [11]).

Arresting a suspect on a suspicion of driving under the influence of intoxicating liquor

In *Minister of Safety and Security & another v Swart* 2012 (2) SACR 226 (SCA), the respondent was arrested by a police officer without a warrant on suspicion of driving a motor vehicle on a public road whilst under the influence of intoxicating liquor. The basis for the arrest was that the respondent's vehicle had veered off the road into a ditch, and that his breath had smelled of alcohol (para [4]). The respondent was detained overnight until the charges against him were withdrawn on the following day when the tests revealed that his blood alcohol level at the time of driving was below the permissible legal limit (para [1]).

With reference to the requirements of section 40(1)*(b)* of the Criminal Procedure Act, the Supreme Court of Appeal found that the mere smell of alcohol on the respondent's breath was not sufficient to give rise to a reasonable suspicion that he was under the influence of intoxicating liquor and for that reason could not drive a vehicle (para [18]). No corroborating evidence was offered, it was not submitted that the respondent was unsteady on his feet, that his speech was slurred, or that his eyes were bloodshot, for example (para [21]). These well-known clinical features of intoxication are still extremely important in proving the effects of intoxication (Le Roux A 'Medico-legal aspects regarding drunk driving' (2007) 2 *South African Journal of Criminal Justice* 220–242).

Prescribed Minimum Sentences

A previous conviction under of section 51 of the Criminal Law Amendment Act 105 of 1997

In *S v Qwabe* 2012 (1) SACR 347 (WCC), the appellant was convicted on two counts of robbery with aggravating circumstances, the unlawful possession of a dangerous weapon, and two counts of attempted murder. He was sentenced to an effective twenty years' imprisonment: twenty years for each count of robbery; ten years on each count of attempted murder; and one year on the count of possession of a dangerous weapon. These counts were to run concurrently. With regard to the twenty years imposed for each of the robbery convictions, the sentencing court applied section 51(2)*(a)*(ii) of the Criminal Law Amendment Act 105 of 1997, and regarded the appellant as a second offender due to his previous convictions for assault with the intent to inflict serious injury, and for robbery (para [19]). The sentencing court also found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence (para [6]).

On appeal it was held that the wording 'any such offence' in section 51(2)*(a)*(ii) of the Criminal Law Amendment Act, requires that the previous conviction must be an offence of the same kind or degree as the offence for which offender is to be sentenced. The appellant's previous conviction of robbery could therefore not be elevated to robbery with aggravating circumstances for the purpose of sentencing in terms of section 51(2)*(a)*(ii) of the Act. The appellant was indeed a first offender of robbery with

aggravating circumstances under section 51(2)*(a)*(i) of the Act, and in terms of this provision, a minimum sentence of fifteen years' imprisonment ought to have been imposed (para [35]). See also *S v Mokela* 2012 (1) SACR 431 (SCA).

The discretion to impose a sentence exceeding the prescribed minimum sentence

In *S v Mathebula and another* 2012 (1) SACR 374 (SCA), the two appellants were convicted of robbery with aggravating circumstances, unlawful possession of a firearm, and the unlawful possession of ammunition. The second appellant was also convicted of the negligent discharge of a firearm in contravention of subsections 39(1) and 39(2)*(d)* of the Arms and Ammunition Act 75 of 1969. The first appellant was sentenced to an effective 23 years' imprisonment, and the second to an effective 24 years' imprisonment. Both were sentenced to a term of twenty years' imprisonment for the robbery with aggravating circumstances for which the minimum sentence in terms of section 51(2)*(a)*(i) of the Criminal Law Amendment Act 105 of 1997 is only fifteen years.

The appeal court confirmed that a sentencing court has the discretion to impose a sentence exceeding the prescribed minimum sentence of the Criminal Law Amendment Act 105 of 1997. Such a discretion must, however, be exercised judicially and be based on reasonable grounds. Where a magistrate departs from the prescribed minimum sentences, reasons must be provided for the departure. Where these are not forthcoming, the conclusion becomes inescapable that the sentencing magistrate's decision is arbitrary, or that the sentencing discretion was not exercised judicially (para [10]).

In *S v Methembu* 2012 (1) SACR 517 (SCA), it was emphasised that the defence must be notified that the presiding officer is contemplating imposing a sentence higher than the minimum prescribed by the Criminal Law Amendment Act 105 of 1997.

PROCEDURAL IRREGULARITIES

In 2012 a number of cases were decided in which it was alleged that certain procedural irregularities constituted a failure of justice, and that the convictions and sentenced imposed had to be set aside. In *S v Daniels & another* 2012 (2) SACR 459 (SCA), the court reconsidered the test for 'a failure of justice'. It was held that a failure of justice will lead to an unfair trial, a review or appeal court must, therefore, exclude all aspects of the trial

that were affected or influenced by the irregularity, and evaluate whether the remaining evidence still supports the outcome in the court *a quo* (para [14]; see also *S v Carter* 2007 (2) SACR 415 (SCA) and *S v Jaipal* 2005 (1) SACR 215 (CC).

A procedural irregularity will, therefore, not automatically nullify the proceedings, the review or appeal court must rather '. . . reassess the evidence without the irregularity or defect in order to determine whether a conviction must inevitably have followed' (para [16]).

Interpreters

The applicants in *Sayed & another v Levitt NO & another* 2012 (2) SACR 294 (KZP), were charged with various counts under the Prevention of Organised Crime Act 121 of 1998, the Sexual Offences Act 32 of 2007, and the Immigration Act 13 of 2002. The applicants alleged that gross irregularities during the trial proceedings required that the proceedings be reviewed and set aside under section 24 of the Supreme Court Act 59 of 1959. Among their allegations was that the *ad hoc* interpreter used during the trial proceedings had not been sworn in, nor was any enquiry conducted into the interpreter's competency and ability to interpret from Thai into English. This they supported from the court record which showed that the interpreter was not fluent in English, that there were times when the court did not understand what was said, and it was difficult for those testifying to understand the interpreter (para [3]). It was alleged that these irregularities tainted the entire proceedings before the trial court, and that the convictions had to be set aside (para [3]).

In considering whether these irregularities constituted a miscarriage of justice, it was found that they indeed impacted on the evidence adduced, and that it should not have been found admissible. However, as the presiding officer at the trial had already considered the evidence and delivered a judgment based on it, the irregularities could not be cured without prejudicing the applicants (para [17]).

Emphasising the important role that interpreters play in legal proceedings and the importance of adhering to all procedural requirements in this regard, the court ordered that the proceedings before the court *a quo* be set aside and that a trial commence *de novo* before a different regional magistrate (para [18]).

Assessors

In *S v du Plessis* 2012 (2) SACR 247 (GSJ), the accused appealed against his conviction and sentence alleging that the trial court had failed to comply with the provisions of section 93*ter*(1) of the Magistrates' Courts Act 32 of 1944. In terms of this provision, a judicial officer may summon the assistance of one or two assessors before any evidence has been led, or in considering a community-based punishment in respect of any person who has been convicted of any offence. Section 93*ter*(3) provides expressly that once the members have been sworn in, they become members of the court. Subsections (10) and (11) address when an assessor is to be recused, or is no longer able to continue with a sitting (para [3]). Section 93*ter*(2) specifically requires that assessors be appointed for murder trials in a lower court unless the necessity to do so is waived by the accused (para [10]).

In this case the magistrate had failed to comply with section 93*ter*(2). The record did not show that any assessors were appointed either before the evidence commenced or thereafter (para [4]). The record also did not reflect that any assessors were sworn in or were given any directions as to their functions by the magistrate. Nor was the accused afforded the opportunity to elect to continue with the trial in the absence of assessors. The judgment also did not indicate whether it was unanimous, or a decision of the majority of the court (para [5]). It was, therefore, concluded that the magistrate had not followed the provisions of section 93*ter* of the Magistrates' Courts Act 32 of 1944, and the appeal court had to find on the effect of this irregularity (para [10]).

The important role played by assessors in murder trials in lower courts was emphasised. They not only assist the magistrate in bridging any cultural or educational gaps that may exist between the court and the accused, but may also decide on issues of fact. Accused persons must, therefore, be given the opportunity to make an informed decision whether to continue with the trial with or in the absence of assessors (para [11]). The conviction and sentence were set aside (para [26]). For a contrary decision see *S v Naicker* 2008 (2) SACR 54 (N).

Written authorisation by the DPP as a requirement for a prosecution

In *S v Molefe* 2012 (2) SACR 574 (GNP), the accused pleaded guilty to a charge of contravening section 113(1) read with

sections 113(2) and (3) of the General Law Amendment Act 46 of 1935. It was alleged that she had unlawfully and with the intent to conceal the fact of the birth of her child, attempted to dispose of the body of the child. Before her conviction, however, the magistrate asked the prosecutor whether the Director of Public Prosecutions (DPP) had authorised the prosecution in writing as required by section 113(3) of the Act. It transpired that the DPP had given only verbal consent. The magistrate nonetheless convicted the accused but referred the matter for special review (para [3]).

The review court found that the requirement that the DPP must authorise the prosecution in writing is unequivocal and a prerequisite for the prosecution in terms of section 113 of the General Law Amendment Act 46 of 1935 (para [6]). It was further held that the evidence did not prove that the accused tried to dispose of or conceal the body of her child, and this was the central element of the crime created in section 113 of the Act. There was also no evidence that the foetus found by the police was older than 28 weeks and therefore viable (paras [10]–[12]). The conviction was consequently set aside.

A Restraint Order in Terms of the Prevention of Organised Crime Act 121 of 1998

The applicant in *Naidoo and others v National Director of Public Prosecutions and another* 2012 (1) SACR 358 (CC), was charged with 119 counts of dealing in unwrought metals. The National Director of Public Prosecutions (NDPP) obtained a provisional restraint order against the applicant and his former spouse under section 26 of the Prevention of Organised Crime Act 121 of 1998 (POCA). The restraint order against the applicant's former spouse was obtained on the basis that the specified assets constituted an affected gift to her by the applicant. It also covered two companies of which the applicant's wife was the sole director and shareholder (para [2]).

The applicant subsequently applied for an order, in terms of section 26(6) of POCA, for his reasonable legal expenses to be paid from the restrained assets held by his former spouse and the two companies (para [5]). The High Court found that the property held by the applicant's former spouse was restrained because it constituted an 'affected gift' from the applicant, and in terms of the provisions of POCA. Legally, the property therefore belonged

to the applicant and could be released to pay his legal expenses (para [7]).

The Supreme Court of Appeal, however, held that the plain grammatical meaning of section 26(6)*(b)* of POCA, read with section 26(6)*(a)*, is that a restraint order may provide for the legal expenses only of the person against whom it is made, and not for the legal expenses of a third person against whom a restraint order is also made at the same time (para [9]).

The applicant argued that the narrow interpretation of section 26(6) of POCA, as applied by the Supreme Court of Appeal, infringed on his right to a fair trial and his right to employ legal representatives of his choice. And, if the property was indeed to be construed as an 'affected gift' then it should be regarded as being held by the applicant who had made that gift (para [12]).

The Constitutional Court agreed with the finding of the Supreme Court of Appeal and, taking into consideration the objective of POCA, held that section 26(6) allows for reasonable living and legal expenses only in limited terms. First, access is only granted for the legal expenses of a person against whom the restraint order is made, and this is conditional on full disclosure by that person of all his or her assets. That person must further, not be able to meet the expenses concerned out of his or her unrestrained property. Based on these conditions, it was held, section 26(6) cannot reasonably be interpreted also to give access to property held by a person other than the person against whom the restraint order has been made (para [20]). 'The provision for reasonable legal and living expenses in s 26(6) is narrowly and finely crafted. Its careful mechanism should not readily be overridden. And its overall legislative purpose must be borne in mind' (para [30]).

Section 112 of the Criminal Procedure Act 51 of 1977

The difference between sections 112(1)(a) and (b)

The accused in *S v Kholoane* 2012 (1) SACR 8 (FB), pleaded guilty to four charges of theft and was sentenced to a fine of R5 000 or 90 days' imprisonment. On special review under section 304(4) of the Criminal Procedure Act, it emerged that the accused had not been questioned in terms of section 112(1)*(b)* of the CPA. The sentencing magistrate indicated that she had acted in terms of section 112(1)*(a)* of the Act.

Section 112(1)*(a)* of the CPA applies to minor crimes which ordinarily attract lenient sentences in terms of limited sentencing

options. Judicial questioning is therefore not compulsory when an accused is convicted in terms of section 112(1)*(a)* (para [3]). Section 112(1)*(b)*, however, applies to serious crimes which usually attract more severe sentences and judicial questioning of the accused is, therefore, peremptory (para [4]). The primary purpose of such questioning is to determine whether the accused indeed admits to all the elements of the crime to which he or she is pleading guilty, and serves to protect an uneducated/uninformed/undefended accused from the adverse consequences of an ill-informed plea of guilty (para [5]).

The review court held that as the accused in this particular matter had not been questioned in terms of section 112(1)*(b)*, and the lawfulness of her conviction not confirmed, the sentence could not simply be adjusted to fall within the limited sentencing options available for section 112(1)*(a)* convictions. The sentencing magistrate's finding not only lacked procedural fairness, it also lacked substantive fairness as the accused's guilt had not been established beyond a reasonable doubt (para [17]).

A written statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977

In *S v Mbuyisa* 2012 (1) SACR 571 (SCA), the appellant pleaded guilty, by way of a section 112(2) statement, to a charge of attempted murder and was sentenced to eights years' imprisonment conditionally suspended for four years. On appeal against the conviction, the appellant argued that her section 112(2) written statement was no more than a regurgitation of the allegations in the charge-sheet, and that it therefore lacked the essential details relevant to the facts underlying the charge (para [6]).

The Supreme Court of Appeal, however, found that '. . . while it is . . . undesirable for allegations contained in the charge-sheet to merely be repeated in a s 112(2) statement, there is no inflexible rule that an accused who uses certain of its phraseology in a charge cannot be convicted' (para [7]). All that is required from a written section 112(2) statement, is that the accused admit to all the essential elements of the charge, irrespective of whether this is done in his or her own words, or with reference to the words and phrases used in the charge sheet (para [8]).

SEARCH AND SEIZURE OPERATIONS

In *Polonyfis v Minister of Police and others NNO* 2012 (1) SACR 57 (SCA), members of the SAPS requested the magistrate

(seventh respondent) to issue a search warrant for the appellant's business premises under section 21 of the CPA. The application for the search warrant was supported by an affidavit in which it was claimed that the appellant had no licence for the casino machines he held and operated on the premises. An undercover operation in terms of section 252A of the CPA was also mounted, and the allegations and suspicions that the appellant was operating an illegal casino were confirmed.

The search warrant was issued, and during a search the premises, members of the SAPS seized cash, gambling machines, a coin-counting machine, a scale used for weighing tokens, tokens worth fifty cents each, documents, receipt books, keys, ashtrays, chairs and some other smaller items (para [5]). In the course of the search operation the appellant was asked for his identity document which, he replied, was in his hotel room. A member of the SAPS accompanied him to his hotel room to retrieve the document. However, in the hotel room a book containing telephone numbers was also seized. It was hoped that the contact details of the appellant's employer were in this book.

The appellant attacked the lawfulness of the search and seizure operation on four grounds: The warrant did not indicate which subsection of section 20 of the CPA was applicable, the address of the premises to be searched was described only vaguely, the officers conducting the search did not present the affidavit when the warrant was executed, and the execution of the warrant was unlawful because the SAPS seized objects not mentioned in the warrant (para [8]).

For a warrant to be justified, information showing that there are reasonable grounds to believe that a crime had been committed, and that an article connected with the suspected crime is to be found upon the particular premises, must be placed before the officer issuing the warrant. In some instances, the search will be for a particular article, while in others the existence of any particular article will be uncertain. In the latter cases, however, it can be expected that an article or articles of a particular kind will exist if the offence was indeed committed. Such a search and seizure operation makes material inroads into the rights of the suspect, and it is important that the information before the issuing officer sufficiently discloses a reasonable suspicion that an offence had been committed. The resulting warrant must authorise only that which is strictly permitted under the CPA. A search and seizure warrant must, therefore, be clear and within the limits set by the CPA (para [9]).

With regard to the appellant's contention that the warrant was invalid because the magistrate did not indicate which subsection of section 20 applied, the court held that the magistrate had substantiated his decision well, and that it was accepted that all three subsections of section 20 applied to the targeted articles envisaged in the warrant. The magistrate was therefore correct in not limiting the warrant to any of the subsections of section 20 (para [13]).

The appellant's second and third grounds of attack — that the address in the warrant was too vague, and that the search was invalid because the authorised officer did not present the affidavit together with the warrant — were also rejected. The warrant is required to describe the premises to be searched in sufficient detail to allow the official authorised to search to identify it. Absolute accuracy in the description of the premises is not required, nor will a technically incorrect address automatically invalidate the warrant if it otherwise describes the premises with sufficient clarity (para [16]). Further, when the authorising officer read out and handed over the warrant, the appellant did not demand the affidavit. Had he done so, it would have been available as the officer had it at the time of the search. While the authorising officer recognised that it was an oversight on his part not to hand over the affidavit, the appellant also did not demand it and this ground of attack therefore failed (para [21]).

However, in this search and seizure operation, the SAPS seized articles that were not covered by the warrant and could also not justify the seizure of these articles on any other ground. The High Court therefore correctly ordered that the articles be returned, but this did not nullify the entire search and seizure operation. The conduct of the police in this particular case, did not amount to an abuse of power or a gross violation of the appellant's rights — it merely exceeded its ambit. This is rectified in the High Court order for the return of the articles (paras [22]–[23]). The appeal was dismissed with costs.

See also *Minister of Safety and Security and others v Mohamed and another* 2012 (1) SACR 321 (SCA), on the validity requirements for search and seizure warrants, that the warrant must be intelligible or capable of being understood, and must authorise no more than is allowed under the authorising statute. See further, *S v Van Deventer & another* 2012 (2) SACR 263 (WCC), where the search and seizure warrant was based on an incorrect statute and items were seized that did not fall within the ambit of the

warrant. Notwithstanding this, the court found that the evidence remained admissible as its admission was not unfair to the appellants or detrimental to the administration of justice. However, in *Ivanov v North West Gambling Board & others* 2012 (2) SACR 408 (SCA), the Supreme Court of Appeal held that once a warrant has been declared invalid: '. . . the invasion of privacy and the search and seizure cannot retain the lawfulness thereof, as the essence of what made the dispossession lawful falls away' (para [17]).

Sentencing in Cases Where There is an Element of Racial Discriminatory Connotations

In *S v Combrink* 2012 (1) SACR 93 (SCA), the appellant fired shots at and killed an unidentified person walking across his farmland. The deceased was later identified as one of his farm workers and he was convicted of murder and sentenced to fifteen years' imprisonment, five years of which were suspended for five years on the usual conditions.

With reference to the exposition in *S v Malgas* 2001 (1) SACR 469 (SCA), (2001 (2) SA 1222; [2001] 3 All SA 220), it was held that the trial court focused exclusively on the mitigating factors and failed adequately to consider the aggravating factors. For example, the appellant's personal circumstances were overstated and the personal circumstances of the deceased and the gravity of the offence were virtually ignored (para [22]). The only aggravating circumstance mentioned during sentencing was that after realising that he had shot the deceased, the appellant had failed immediately to assist him. The appellant also showed no remorse and continued to deny that he had committed any offence (para [23]).

Courts were also cautioned to be conscious of and sensitive to cases which appear to have a racial or discriminatory connotation: '[T]he public is incensed with (sic) sentences that appear to favour a particular group in society. The public interest is one of the essential considerations in determining an appropriate sentence.'. This is important as the effect of hate crimes goes far beyond the victims of the crime, and serves to traumatise whole communities and damage South African society (para [24]). The sentence was amended to fifteen years' imprisonment.

Special Sentencing Provisions in Terms of Section 276 of the Criminal Procedure Act 51 of 1977

Section 276A(3) of the Criminal Procedure Act 51 of 1977

In *Ex Parte Department of Correctional Services: In re S v Mtshabe* 2012 (1) SACR 526 (ECM), the procedure and operation of section 276A(3) of the CPA came under scrutiny. The chairman of the Parole Board of the Amathole Management Area applied for the sentence of the prisoner to be reconsidered in terms of section 276A(3)*(a)* of the CPA, so that the prisoner could be released from prison, and for the balance of his sentence to be converted to one of correctional supervision subject to conditions. At the time of this application, the prisoner had served two years of his eight year term.

Griffiths J for the Eastern Cape High Court, Mthatha, questioned why the matter was not being considered by the presiding officer who had presided at the trial and sentencing, as section 276A(3)*(c)*(i) specifically requires that such a matter be brought before the trial judge, and only if he or she is not available, that a different judicial officer of the same court be appointed to preside over the application. It was held that the fact that presiding judicial officer is on long-leave does not make him or her 'unavailable' to hear the matter, and that the matter should stand over until the presiding officer's return (para [7]). It is evident that the legislature intended the judicial officer who presided over the trial and sentencing to assume primary responsibility for any reconsideration of sentence (para [23]) as he or she is in the best position to reconsider the sentence originally imposed. The trial judge will be able to reconsider all the factors and circumstances he or she considered in imposing the original sentence, and to reconsider the sentence in terms of section 276A(3) of the CPA. If a different presiding officer reconsiders the sentence under section 276A(3), there is a risk that the factors originally considered, may be played down, or that new factors be overemphasised. This could result in a miscarriage of justice (para [18]).

Whether a trial judge is 'unavailable' for the purposes of section 276A(3)*(c)*(i), is a question which depends on the merits of each case, and one that should be approached with a measure of flexibility, but also with due consideration of the preference for the trial judge to reconsider the sentence [para [24]).

Section 276B of the Criminal Procedure Act 51 of 1977

In *Ex parte Department of Correctional Services: In re S v Mtshabe* 2012 (1) SACR 526 (ECM), the court emphasised that the interests of the Department of Correctional Services in prisoners being released early in response to overcrowding in South African prisons, did not warrant exceptions being made or processes being fast-tracked (para [27]). Sentencing orders serving only the interests of the Department of Correctional Services or those of the court, were also criticised in *S v Stander* 2012 (1) SACR 527 (SCA). Here the appellant was convicted on 22 counts of fraud and sentenced to eight years' imprisonment of which two years were conditionally suspended for five years. The magistrate also ordered, under section 276B of the CPA, that the appellant serve at least 36 months of his sentence before he could be released on parole (para [1]). The magistrate, in his reasons for refusing the appellant leave to appeal, stated that the only reason why the court refused parole was to prevent the Department of Correctional Supervision from the burdening the court, after the appellant had served three years of his sentence, with an application to have the sentence converted under section 276A(3) of the CPA (para [5]).

The Supreme Court of Appeal criticised this 'order of convenience' and held that it constitutes a serious misdirection where such orders are made solely for the convenience of the Department of Correctional Supervision and/or the court (para [6]). Decisions on parole are generally regarded as the exclusive domain of the Department of Correctional Services, and until section 276B was enacted, no statute empowered a court to make orders regarding the period of imprisonment to be served before release on parole could be considered (para [8]). Despite this empowering provision, courts were warned not to venture into the terrain traditionally reserved for the executive (para [12]). A stringent statutory procedure exists for the consideration of a prisoner's release on parole, and the Department of Correctional Services (and not the sentencing court) is ultimately in the best position to make decisions on a prisoner's release (para [13]).

Therefore, before a court makes a non-parole order, exceptional circumstances must exist and what these circumstances are, will depend on the particular facts of the case (para [20]; see *Pauls v S* [2011] JOL 26717 (ECG)).

Section 276(1)(i) of the Criminal Procedure Act 51 of 1977

The appellant in *S v Truyens* 2012 (1) SACR 79 (SCA), was convicted of stock theft in contravention of section 11 of the Stock

Theft Act 57 of 1959, and sentenced to four years' imprisonment under section 276(1)(i) of the CPA. In terms of this provision, the appellant had to serve only a minimum period of eight months' imprisonment before being eligible for consideration for placement under correctional supervision.

It is clear from the record that the sentencing magistrate carefully considered the appellant's circumstances before deciding on an appropriate sentence. While the appellant had previous convictions for theft, a considerable time had elapsed between the earlier and the current conviction. It also emerged that the appellant only stole and sold the stock in order to pay the medical expenses for his three sick children. Even though he had initially pleaded not guilty, the magistrate found that he was contrite, he did not offer a false version in an attempt to evade responsibility, and he eventually confessed fully to the charges and expressed the hope that he would now have a chance to change his life (para [13]). However, while the magistrate had sympathy for his unique personal circumstances, he also felt that to suspend the sentence in its entirety, was not appropriate, especially as the appellant had abused his employer's trust (para [17]).

Section 276(1)*(i)* of the CPA is appropriate when the sentencing court cpnsiders that a custodial sentence is warranted, but the nature of the offence is such that an extended period of incarceration is not appropriate (see *S v Scheepers* 2006 (1) SACR 72 (SCA); para [18]]). A sentence under section 276(1)*(i)* should also not be seen as a softer option than an ordinary sentence of direct imprisonment. It is said merely to grant the Commissioner the latitude to consider an early release under correctional supervision — after one-sixth of the sentence has been served, and only if the personal circumstances of the offender warrant it. In terms of section 276A(3)*(a)* of the Act, the Commissioner may apply to the sentencing court to reconsider a sentence not exceeding five years' imprisonment, or exceeding five years' imprisonment where the date of release is no more than five years away (para [27]).